

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
The New Jersey Division of the Ratepayer)	
Advocate Petition for Declaratory Ruling)	CC Docket No. 00-49
Seeking Preemption of Certain Legal)	
Requirements Imposed on)	
Telecommunications Carriers by the New)	
Jersey Board of Public Utilities)	

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 2002

Released: June 6, 2002

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* denies the petition of the New Jersey Division of the Ratepayer Advocate (Ratepayer Advocate) for preemption of certain legal requirements imposed on telecommunications carriers by the New Jersey Board of Public Utilities (Board).¹ Specifically, the Ratepayer Advocate requests that the Federal Communications Commission (Commission) issue a declaratory ruling finding that the Board's setting of permanent rates for unbundled network elements (UNEs) and resale is inconsistent with and violates sections 251, 252, and 253 of the Telecommunications Act of 1934, as amended (Act), the regulations implementing these sections, and applicable Commission orders. For the reasons set forth below, we deny the Ratepayer Advocate's petition because it fails to demonstrate that the establishment of generic rates precludes parties from arbitrating or negotiating different rates in New Jersey and because the Ratepayer Advocate's claims concerning the validity of the New Jersey Board's generic rates are moot.

II. BACKGROUND

2. The Board initiated an investigation and rulemaking proceeding on December 8, 1995, to determine appropriate terms for local telephone competition in New Jersey. By order of

¹ *New Jersey Division of the Ratepayer Advocate Petition for a Declaratory Ruling Seeking Preemption of Portions of the New Jersey Board of Public Utilities' Generic Proceeding Order*, CC Docket No. 00-49 (filed Mar. 3, 2000) (Ratepayer Advocate Petition).

June 20, 1996, the Board set in motion a comprehensive hearing process, or “Generic” Proceeding, to set generally available rates and conditions for new market entrants in New Jersey without the need for negotiation and arbitration of individual interconnection agreements as provided for in the Act.

3. At about this time, AT&T requested interconnection agreements with Bell Atlantic/New Jersey (hereinafter, AT&T/Bell Atlantic interconnection agreement),² the incumbent local exchange carrier (LEC), pursuant to section 252(a) of the Act. Because the parties were not able to resolve certain issues through negotiation, AT&T filed a petition with the Board to arbitrate several unresolved issues.³ From September 23, 1996, through October 15, 1996, AT&T and Bell Atlantic participated in an extensive arbitration proceeding. On November 8, 1996, the Arbitrator assigned to the case issued a decision resolving the disputed issues between AT&T and Bell Atlantic, finding that AT&T’s cost model (with some modifications) properly calculated the forward-looking economic costs of providing interconnection and network elements. Bell Atlantic refused to sign the interconnection agreement, and petitioned the Board to insert Commission interim rates rather than the arbitrator-approved rates until the Generic Proceedings were complete.

4. At its July 17, 1997 public agenda meeting, the Board established generic rates, terms, and conditions that were different from the arbitrated provisions resulting from the AT&T and Bell Atlantic arbitration and applied them to the AT&T/Bell Atlantic interconnection agreement.⁴ On September 9, 1997, the Board ordered AT&T to submit a fully executed agreement incorporating the generic rates and, on October, 8, 1997, the Board approved the AT&T/Bell Atlantic interconnection agreement incorporating the generic rates.

5. On November 24, 1997, AT&T filed a complaint before the United States District Court for the District of New Jersey (District Court) seeking review of, among other things, the Board’s authority to substitute generic rates for those won in arbitration between AT&T and Bell Atlantic.⁵ The Ratepayer Advocate was later granted permission to intervene, and subsequently adopted AT&T’s pleadings. On June 6, 2000, the District Court found that “the Board acted within its statutory authority to determine fair and reasonable rates when it substituted the

² We refer to Bell Atlantic, where appropriate, rather than Verizon because Bell Atlantic’s filings in this docket were made prior to the completion of the merger with GTE. *See Application of GTE Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000).

³ 47 U.S.C. § 252(b) (permitting a party negotiating an interconnection agreement to petition the relevant state commission to arbitrate any open issues).

⁴ These findings were published in a formal Decision and Order, the “Generic” Proceeding Order, on December 2, 1997.

⁵ *AT&T Communications of New Jersey Inc. v. Bell Atlantic - New Jersey, Inc.*, No. 97-5762 (D.N.J. 2000). According to section 252(e)(6) of the Act, any party taking issue with the final arbitrated interconnection agreement as approved by the state commission may seek judicial review in federal District Court. *See* 47 U.S.C. § 252(e)(6).

generic rates for the arbitrated rates.”⁶ The District Court further explained that “[t]he Board’s decision to use rates derived from the comprehensive proceeding was consistent with its obligation under the statute to obtain all necessary information.”⁷ According to the District Court, however, the Board’s generic rates were the result of “arbitrary and capricious” decision-making.⁸ The District Court therefore reversed the generic rate determinations and remanded the case to the Board for further proceedings.⁹ On June 30, 2000, the Ratepayer Advocate filed a Notice of Appeal before the United States Court of Appeals for the Third Circuit (Third Circuit) appealing that part of the District Court’s decision holding that the Act authorizes the Board to substitute generic provisions for the terms of an agreement reached by arbitration under the Act.¹⁰ The Third Circuit dismissed the Ratepayer Advocate’s appeal for lack of standing, finding that there was no concrete injury to the Ratepayer Advocate as a result of the Board’s decision to substitute generic rates for those won in arbitration.¹¹

6. Subsequent to filing its District Court appeal, but before the District Court’s decision, the Ratepayer Advocate filed this preemption petition raising identical issues addressed by the District Court and raised on appeal to the Third Circuit. Specifically, the Ratepayer Advocate requests that the Commission preempt certain legal requirements imposed by the Board in its *Generic Proceeding Order* because, it asserts, the establishment of permanent rates in the Generic Proceeding conflicts with the Act and the Commission’s *Local Competition Order*.¹² We view the Ratepayer Advocate’s petition as presenting two different issues for the Commission’s decision: (1) whether the Board’s action in mandating the Generic Proceeding provisions to the AT&T/Bell Atlantic interconnection agreement is unenforceable because the Board’s action precludes a party from using negotiation and arbitration to obtain more favorable rates;¹³ and (2) whether the generic rates themselves were invalid.¹⁴

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See Brief for the New Jersey Division of the Ratepayer Advocate at 3, *AT&T of New Jersey, Inc. v. Bell Atlantic – New Jersey, Inc.*, No. 00-2000 (3d Cir. filed Nov. 20, 2000). AT&T was not a party to the Ratepayer Advocate’s appeal.

¹¹ *AT&T Communications of New Jersey Inc. v. Bell Atlantic – New Jersey, Inc.*, 270 F.3d 162 (3d Cir. 2001).

¹² Ratepayer Advocate Petition at 19-20, 25-29.

¹³ *Id.* at 19, 25.

¹⁴ *Id.* at 18-19. Specifically, the Ratepayer Advocate contends that preemption relief is appropriate because the Generic Proceeding rates set by the Board were not based upon a forward-looking economic cost study or generic model approved by the Commission. *Id.* at 19-20.

III. DISCUSSION

7. Based on the evidence in the record, and without addressing the appropriateness of the generic rates themselves, we find no violation of section 253(a) of the Act or other applicable federal law.¹⁵ Specifically, we find that the Ratepayer Advocate has not provided sufficient evidence that carriers are precluded from arbitrating or negotiating different rates in New Jersey. We also find that it is not necessary for the Commission to engage in an inquiry that duplicates the district court's evaluation in this case.¹⁶ As noted above, the District Court found that the Board had acted properly with respect to the AT&T rates, which were arbitrated rates in a pending case before the Board when it substituted the generic rates.¹⁷ The Ratepayer Advocate's alternative proffer of evidence that no other interconnection agreement contains different rates does not constitute evidence that competitive carriers are "precluded" from arbitrating or negotiating different rates in New Jersey. Accordingly, we do not preempt the Board in the instant case pursuant to section 253(d) of the Act because the Ratepayer Advocate has not demonstrated that the establishment of the generic rates precludes parties from arbitrating or negotiating different rates in New Jersey.

8. Our decision in this case necessarily follows our decision in the *Texas Preemption Order*.¹⁸ In that order, the Commission declined to preempt several provisions of the Texas Public Utility Regulatory Act of 1995 because the Texas Public Utility Commission represented that the provisions in question would not preclude parties from negotiating or arbitrating more favorable terms or conditions under sections 251 and 252.¹⁹ Similarly, in the instant case, the Board has repeatedly stated that it has not precluded carriers from arriving at rates in arbitrations or negotiations which differ from those determined by the Board in the Generic Proceeding.²⁰

¹⁵ See, e.g., Bell Atlantic Comments at 1. We conclude that, based on Commission precedent in the *Minnesota 253 Order*, the Generic Proceeding Order rises to the level of a "statute, regulation, or legal requirement," and that section 253(a) applies to the Generic Proceeding Order. See *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707 (1999).

¹⁶ See *MCI WorldCom Network Services, Inc. v. FCC*, 274 F.3d 542 (D.C. Cir. 2001) (finding that "it was not unreasonable for the FCC to decline to engage in an inquiry that duplicates the function given state public utility commissions and the federal courts by law in the Telecommunications Act of 1996, 47 U.S.C. § 252").

¹⁷ *AT&T Communications of New Jersey Inc. v. Bell Atlantic - New Jersey, Inc.*, No. 97-5762 (D.N.J. 2000).

¹⁸ *The Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997) (*Texas Preemption Order*).

¹⁹ *Id.* at 3467; see also Ratepayer Advocate Petition at 11.

²⁰ See Board Reply Comments at 2. As the Board stated:

[C]ontrary to the [Ratepayer] Advocate's argument, the Generic Order does not preclude the prospective use of negotiations or arbitrations. . . . [T]he Board, in the Generic Order, made no ruling and issued no directive precluding ILECs and CLECs from prospectively negotiating or arbitrating in an attempt to obtain more favorable terms,

(continued....)

Thus, we find that the Generic Proceeding Order does not preclude carriers from negotiating or arbitrating rates under sections 251 or 252 of the Act.

9. Concerning the Ratepayer Advocate's claim that preemption relief is appropriate because the Generic Proceeding rates set by the Board were not based upon a forward-looking economic cost study or a generic cost model approved by the Commission, we note that on November 20, 2001, the Board set new wholesale rates for competitors who utilize parts of Verizon's telephone network to provide local service to New Jersey consumers.²¹ Because the challenged rates are no longer currently in effect in New Jersey and, thus, there is no live controversy over the lawfulness of the rates, we deny as moot the Ratepayer Advocate's request to preempt the rates originally set by the Board in 1997.

IV. CONCLUSION

10. For the foregoing reasons, we deny the Ratepayer Advocate's petition, and thus do not preempt the Board's Generic Proceeding pursuant to section 253 of the Act.

V. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that, pursuant to section 253 of the Communications Act of 1934, as amended, and sections 0.91 and 0.291 of the Commission's rules, 47 U.S.C. § 253 and 47 C.F.R. §§ 0.91 and 0.291, the Petition for Commission preemption of jurisdiction filed by the New Jersey Division of the Ratepayer Advocate on March 3, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Dorothy T. Attwood
Chief, Wireline Competition Bureau

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subject to approval by the Board under Section 252's standards. . . . [P]rospective arbitrators will be able to be guided by the Board's analysis set forth in the Generic Order in evaluating the records created before them.

Id. (citing December 11, 1998 Brief of the Board, 29-30).

²¹ Summary Order of Approval, *The Board's Review of Unbundled Network Element Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc.*, NJ BPU Docket No. TO00060356 (Dec. 17, 2001). The Summary Order memorializes the decision of the Board at its public agenda meeting of November 20, 2001.

LIST OF COMMENTERS**Comments**

1. National ALEC Association/Prepaid Communications Association
2. New Jersey Board of Public Utilities
3. Nextlink Communications, Inc.
4. Telecommunications Resellers Association

Reply Comments

1. AT&T
2. Bell Atlantic
3. New Jersey Board of Public Utilities
4. New Jersey Division of the Ratepayer Advocate